EX PARTE OR LATE FILED

Law Offices

BESOZZI, GAVIN & CRAVEN

1901 L Street, N.W., Suite 200
Washington, D.C. 20036

Telephone: (202) 293-7405
Facsimile: (202) 457-0443

Paul C. Besozzi

May 1, 1995

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Stop Code 1170
Room 222
Washington, DC 20554

Re: PR Docket No. 93-144

Dear Mr. Caton:

Enclosed in accordance with Section 1.1206 of the Commission's Rules, is a written Ex Parte Presentation in the reference docket.

Sincerely yours,

Paul C. Besozzi

PCB:lyt
139/WCaton.ltr
Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Part 90 of the	)	
Commission's Rules to Facilitate	)	PR Docket No. 93-144
Future Development of SMR	)	RM-8117; RM-8030;
Systems in the 800 MHz	)	RM-8029
Frequency Band	)	
	)	
and	)	
	)	
Implementation of Section 309(j)	)	
of the Communications Act -	)	
Competitive Bidding 800 MHz SMR	)	

To: **The Commission** (Ex Parte Presentation)

SUPPLEMENTAL CONSOLIDATED REPLY COMMENTS OF DRU JENKINSON, INC., JANA GREEN, INC., AND SHELLY CURTTRIGHT, INC.

In accordance with the Commission's Further Notice of Proposed Rule Making in the captioned proceedings, released November 4, 1994 (hereinafter "Further Notice")[1/], and acting through telecommunications counsel, Dru Jenkinson, Inc., Jana Green, Inc., and Shelly Curttright, Inc. (collectively hereinafter "Licensees") hereby submit these supplemental consolidated reply comments. On January 5, 1995, Licensees filed Consolidated Initial Comments. On February 10, 1995, Licensees filed Consolidated Reply Comments. Due to recently-discovered information and new precedent, Licensees now files these Supplemental Consolidated Reply Comments. Licensees are small, female-owned enterprises that already hold 800 MHz Specialized Mobile Radio (hereinafter "SMR") licenses, as well as pending applications for additional such licenses. Copies have been filed under 47 C.F.R. § 1.1206.

I. TREATMENT OF INCUMBENT SYSTEMS

1. As noted in their Consolidated Initial Comments, Licensees generally support the Commission's initiative to implement a new framework for the licensing of wide-area 800 MHz

---

[1/] In the matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band (Further Proposed Rulemaking), FCC 94-271 (released November 4, 1994)("FNPRM").

SMR systems, However, the Commission has previously (and properly) concluded that mandatory relocation of incumbent licensees is impracticable and therefore not in the best interest of the SMR industry. Thus, in the FNPRM, the Commission appropriately reasoned:

> "Based on the record in this proceeding and the numerous comments regarding the Nextel proposal, we tentatively conclude that incumbent systems should not be subject to mandatory relocation to new frequencies pursuant to Nextel's proposed 'band-clearing' approach. We are concerned that mandatory relocation could impose significant costs and disruption on incumbent licensees and their customers. Even if we limit mandatory relocation to instances where there are substitutable channels available and require the costs of relocation to be paid by the MTA licensee, we are also concerned that mandatory relocation would inevitably draw the Commission into disputes between licensees over substitutability of channels, compensable costs, and other related issues. In addition, relocation is likely to be complicated as a practical matter by a lack of sufficient alternative frequencies in many markets to accommodate all incumbents in the MTA blocks on a one-to-one basis. If this is the case, mandatory relocation could require us to become involved in decisions about which incumbents are required to relocated and which are not."

FNPRM, supra, at pp. 21-22, ¶ 34.

2. The Commission must not change its position regarding mandatory relocation because there has been no substantive change in the facts supporting that conclusion. However, Licensees have heard from responsible SMR industry sources that the Commission is considering reversal of its position, in order to allow mandatory relocation of incumbent licensees by the MTA wide-area licensee. As the Commission's underlying rationale for previously rejecting mandatory relocation remains valid, the Commission should not now do a regulatory about-face. Indeed, in light of the practical realities of the SMR industry, adoption of a new regulatory framework for the licensing of wide-area 800 MHz SMR systems with mandatory relocation by the MTA wide-area licensee would serve to restrict rather than foster competition.

3. Adoption of a new regulatory framework for the licensing of wide-area 800 MHz SMR systems with mandatory relocation by the MTA wide-area licensee is only likely to enhance the dominant SMR market position already held by Nextel, Inc. and the other companies it controls ("Nextel"). This would be inconsistent with the Commission's clear

policy in favor of competition.

4. In the FNPRM, the Commission considered the possibility of mandatory relocation of the incumbent licensee provided that the MTA wide-area licensee would "*demonstrate the availability of fully comparable alternative frequencies*". FNPRM, supra, at p. 22, ¶34 (emphasis added). At this juncture, only Nextel can satisfy this demonstration. Over the last few years through merger and acquisition of the channel positions of OneComm, Dial Call, Motorola, and numerous other significant SMR operations, Nextel has established a nationwide-footprint with an associated channel inventory of monopolistic proportion. Similarly-known is the fact that the 800 MHz SMR industry is mature to the extent that all SMR frequencies have either been licensed or are subject to applications presently on file and awaiting processing. Accordingly, only Nextel, by virtue of its large cache of channel positions, would be able to "*demonstrate the availability of fully comparable alternative frequencies*". Therefore, adoption of mandatory relocation would only serve the interests of Nextel; Nextel would be the only potential MTA wide-area licensee which would have the requisite channel position to utilize mandatory relocation. As a result, a regulatory framework which provides for mandatory relocation would serve to advantage only Nextel and bolster the concentration of power of Nextel's channel position in the industry. However, public policy mandates that the Commission foster competition rather than a monopoly.

5. The logical follow-on is that, since mandatory relocation subject to availability of alternate channels is available only to and serves only to advantage Nextel by virtue of Nextel's monopolistic channel position in the industry, entry into the competitive bidding process for other potential MTA wide-area licensees would also be restricted. In a majority of the MTAs, Nextel controls or will control the majority of the SMR channels. Therefore, no other company can realistically bid for these MTA wide-area licenses because insufficient alternative channels exist to relocate Nextel through mandatory relocation. In contrast, in those same MTAs, Nextel has sufficient alternative channels to relocate incumbent licensees.

Therefore, Nextel can use mandatory relocation as both a *shield* and a *sword.*

6. Mandatory relocation would serve to defeat the Commission's public interest objectives. In contemplating the near-term auction of MTA wide-area licenses, the Commission believes that "competitive bidding will further the public interest objectives stated in section 309(j)(3) by promoting rapid development of service, fostering competition, *recovering a portion of the value of the spectrum for the public,* and encouraging efficient spectrum use." (Letter from Chairman Reed E. Hundt to Senator Robert Packwood, dated March 10, 1995, at p. 3, Exhibit A attached). On March 7, 1995, the Commission lifted the bar to the wireline entry into the SMR industry to foster increased competition. However, if only Nextel can qualify to utilize mandatory relocation, then wireline companies are competively disadvantaged to establish themselves as MTA wide-area licensees. As a result, wireline companies, as well as smaller entrepreneurs similarly situated, will be disinterested in submitting competitive bids for the MTA wide-area licenses. Adoption of mandatory relocation will thereby result in fewer bidders (perhaps only Nextel) which will drastically reduce rather than recover *a portion of the value of the spectrum for the public.*

7. The Commission's prior statements in favor of enhanced competition and of economic over regulatory forces support voluntary rather than mandatory relocation of incumbent licensees by MTA wide-area licensees. In the FNPRM, the Commission stated: "We therefore tentatively conclude that decisions regarding relocation should be left to the parties and the marketplace." FNPRM, supra, at p. 22, ¶ 34. Thereafter, and most recently, Chairman Reed Hundt, in speaking of the proposed SMR regulatory framework in his letter to Senator Robert Packwood on March 10, 1995, at p. 1 stated, that:

> "The effort seeks to enhance competition among mobile service providers, promote development and implementation of new and innovative service offerings, and ensure that economic forces, *not regulatory decree*, define the marketplace." (emphasis added).

8. Voluntary relocation is accomplished through economic forces. In contrast,

defining the marketplace by mandatory relocation is through *regulatory decree*. Accordingly, by its own reasoning and statements, the Commission must support voluntary rather than mandatory relocation.

9. Licensees' position on this issue is consistent with public policy and the Commission's previous conclusions. The Commission should adhere to its initial reasoning and findings on this subject. The Commission should not be swayed by alternatives that clearly would have the greatest detrimental impact on incumbent licensees and on competition.

II. THE AUGUST 9, 1994 DEMARCATION

10. In their Consolidated Reply Comments, the Licensees noted the inherent unfairness of exempting licenses issued pursuant to applications filed long-prior to August 9, 1994, but granted subsequent thereto, from the protections of incumbency and other key elements of the revised Part 90 Rules. Licensees (and others who filed Reply Comments) are steadfast in this position.

11. Recently, the Commission itself recognized the inequity of such a situation. In the Matter of Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated July Areas In the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, FCC 95-159, released April 17, 1995. Therein, the Commission concluded as follows:

> "Finally, our delays in processing secondary site applications in the 900 MHz SMR service appear to have produced an inequitable result for applicants who otherwise would have been entitled to protection under the CMRS Third Report and Order. Therefore, we require all MTA licensees to provide complete co-channel protection to all sites for which applications were filed on or before August 9, 1994. Secondary sites based on applications filed after August 9 will not be afforded such protection, however."

Id., at p. 21, ¶53. Precisely the same rationale applies with respect to the discrimination, based merely on a grant date, especially where the delay was engendered by an unofficial processing freeze. As requested in their Consolidated Reply Comments, the Licensees urge that

this disparity in treatment be removed.

III. CONCLUSION

12. The Commission should not, by regulatory fiat, impose mandatory relocation which promotes a monopoly. The Commission's prior announced position of voluntary relocation is in accord with public policy to promote competition. In addition, in accordance with precedent, 800 MHz SMR licenses issued pursuant to applications filed prior to August 9, 1994, should be treated as incumbents under the revised rules.

Respectfully submitted,

DRU JENKINSON, INC., JANA GREEN, INC. AND SHELLY CURTTRIGHT, INC.

By: _____

Paul C. Besozzi
BESOZZI, GAVIN & CRAVEN
1901 L Street, N.W.
Suite 200
Washington, D.C. 20036
Their Attorney

Date: May 1, 1995

0806/supcon.pld

EXHIBIT A

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

March 10, 1995

The Honorable Bob Packwood
Ranking Minority Member
Subcommittee on Communcations
Committee on Commerce, Science, and
Transportation
United States Senate
259 Russell Senate Office Building
Washington, D. C. 20510

Dear Senator Packwood:

This letter responds to the correspondence from you, Senator Burns, Senator Lott, Senator McCain and Senator Stevens addressing the Commission's Further Notice of Proposed Rulemaking (Further Notice) adopted on October 20, 1994, relating to the licensing of 800 MHz Specialized Mobile Radio (SMR) systems. In your letter, you submit questions relating to the impact of the Commission's proposal on small businesses presently operating local SMR systems in the 800 MHz band.

Pursuant to section 6002(b) of the Omnibus Budget Reconciliation Act of 1994 (OBRA), the Commission was required to undertake a review of various services for purposes of establishing a framework that provided a consistent, symmetrical structure governing similar commercial mobile radio services. The effort seeks to enhance competition among mobile service providers, promote development and implementation of new and innovative service offerings, and ensure that economic forces, not regulatory decree, define the marketplace. In its decision adopted on August 9, 1994, as well as in the Further Notice, the Commission sought to pursue a fair and equitable balance between the competing interests of local and wide area SMRs.

Overall, the goal in this proceeding is to establish a structure that promotes both diversity and competition in the SMR service, while encouraging the development of technologically advanced systems resulting in a wide range of consumer choice. In this regard, the Commission has tentatively concluded in the Further Notice that existing licensees should be allowed to continue operating under their present authorizations. Moreover, the Further Notice envisions that incumbents will be provided protection against co-channel interference. While the Further Notice proposes changes that could limit an incumbent's ability to expand its system, it recognizes that incumbents continue to require flexibility to make modifications in order to remain viable and requests comment as how to obtain this objective.

Set forth below are responses to each of the questions in your letter.

1. Given that each market in the nation already has two operating cellular systems and that the FCC will soon license three to six new PCS systems to serve each area, what evidence does the FCC have that an additional one to four new cellular-type SMR systems are needed in each Major Trading Area (MTA)?

The Further Notice seeks to maximize the ability of both large and small SMR systems to compete in the mobile services market, but leaves the marketplace to determine what array of services will be offered to consumers. Although some SMR operators are developing services that are technically similar to cellular, the proposal in the Further Notice does not envision that all MTA licenses would necessarily be used in this manner. Instead, the proposal will provide SMR licensees with the flexibility to provide a wide array of services, some similar to cellular and others less so, for which demand exists. To date, SMR operators have had far less flexibility than either cellular or PCS providers to expand the geographic coverage of their systems or increase channel capacity in order to provide a more diverse array of services to customers. This is due in large part to the fact that SMRs have been licensed for over a decade on a station-by-station basis. This licensing method was initially designed to accommodate small dispatch systems serving local communities, but SMRs increasingly have been used by operators to provide a variety of dispatch, interconnected voice, and other services to large geographic markets.

The administrative burdens imposed by station-by-station licensing (e.g., requiring licensees to obtain separate Commission approval each time a site is added to or relocated in a system), are substantial. The Further Notice reflects what many SMR operators have advocated: to move to some form of area-based licensing of multiple channels as a way of giving licensees greater flexibility to adapt their service offerings to market demand. While there are differences among SMR providers regarding how to achieve this goal, there appears to be widespread agreement that the existing licensing process has outlived its usefulness and operates more to hinder than to stimulate the growth of both large and small SMR systems.

The Further Notice is intended to streamline this process to benefit both large and small systems, thereby allowing the industry to evolve naturally without being constrained by inflexible regulations. In response to concerns that spectrum be made available to SMR operators on the same basis and in comparable amounts to what is afforded cellular and PCS providers, the Further Notice proposes to designate 10 MHz of contiguous spectrum for MTA-based licensing. The proposal seeks to stimulate competition by creating opportunities for SMR operators to provide cellular-type services or other wide-area services that cellular does not provide and that may not be offered by PCS for several years. The Further Notice also proposes to designate 4 MHz of SMR spectrum, and possibly other frequencies, for use by smaller SMR systems that do not seek to operate on a wide-area basis, thereby seeking to set a balance in the allocation of spectrum to large and small SMR systems.

2. Are auctions an appropriate licensing mechanism in a service such as 800 MHz SMR, which presently has hundreds of small business licensees, as well as tens of thousands of small business customers, occupying portions of the channels proposed to be auction?

Under the Further Notice, the circumstances where competitive bidding would be invoked are consistent with section 309(j) of the Communications Act, in which Congress set forth criteria for the use of competitive bidding. First, the proposal to use auctions applies only to issuance of initial licenses in the service, and does not affect rights afforded to licensees under existing authorizations. Second, auctions will only be used in the event that there are competing applications for the same license. Third, where competitive bidding is utilized, opportunity to obtain licenses will not be limited to large SMR operators. As required by section 309(j), the Further Notice proposes special provisions for small businesses to ensure their ability to participate in the auction process.

In implementing its authority under section 309(j), the Commission has determined that the 800 MHz SMR service meets the criteria set forth by Congress for when competitive bidding should be used. As SMR licenses are used to provide service to subscribers for compensation, a precondition to competitive bidding under section 309(j)(2)(A) is met. Additionally, competitive bidding will further the public interest objectives stated in section 309(j)(3) by promoting rapid development of service, fostering competition, recovering a portion of the value of the spectrum for the public, and encouraging efficient spectrum use. Competitive bidding procedures minimize administrative or judicial delays in licensing, particularly in relation to other licensing alternatives such as comparative hearings, lotteries (which are specifically prohibited if the service can be subject to competitive bidding), or first-come, first-served procedures. Finally, the statute does not distinguish between new services (such as PCS) and existing services in terms of whether initial licenses in a given service should be subject to competitive bidding.

3. Why does the FCC's proposal prohibit incumbent SMR systems from expanding their existing service areas without the consent of the future MTA licensees? What are the FCC's estimates of the costs and hardships of this proposal to the small businesses which presently operate dispatch-type systems on 800 MHz SMR channels, and to the small businesses which are the primary customers of these systems?

In this proceeding, as in its efforts overall, the Commission is seeking to bring about an environment where the range of services provided is determined by a fair marketplace and not a governmental licensing process. In order to facilitate area-based licensing in a service that has previously been licensed on a station-by-station basis, a balance must be struck between the interests of prospective area-based licensees and incumbent licensees who continue to operate under pre-existing authorizations. The proposal to allow incumbent SMR systems to expand their existing service areas by arrangements with other licensees seeks to strike such a balance.

Notably, many SMR incumbents are already unable to expand under present rules because of existing licensees in surrounding areas. It is in this context that the proposed restriction on expansion by incumbents should be reviewed. The proposal would give incumbents who do not obtain MTA licenses considerably greater flexibility to modify and upgrade their systems within their existing service areas than current rules provide.

The proposal also seeks to create incentives for licensees to enter into voluntary arrangements that allow cooperative use of spectrum within an MTA block. In addition, the Commission seeks to identify mechanisms, whether voluntary or mandatory, whereby systems that require additional spectrum could use alternative frequencies outside the MTA block. In exploring these alternatives, the Further Notice stated a commitment to ensure that (1) alternative frequencies are comparable or superior to those that are relinquished, (2) the full cost to the incumbent of any frequency relocation is borne by the MTA licensee, and (3) any such mechanism is designed to minimize cost, hardship, or disruption to customers of incumbents.

4. What protections will the FCC adopt to prevent incumbent SMR operators from being driven off their existing channels by large, well financed auction winners? For example, what procedures will the FCC adopt to prevent auction winners from constructing transmitting facilities that interfere with existing SMR systems, and from forcing existing licensees to bear the costs and delays of formal FCC proceedings (and existing customers to bear the loss of degradation of services) before such interference can be eliminated or reduced?

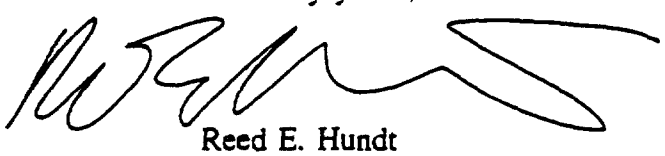
As discussed above, incumbents will continue to be able to provide service as before. Moreover, under the Further Notice, an MTA licensee would be subject to strict co-channel interference criteria preventing it from operating in or near an incumbent's service area or otherwise interfering with the incumbent's operations. The proposal not only incorporates existing co-channel separation rules, which prohibit the placement of SMR transmitters within a minimum distance of existing facilities, but would also provide incumbents with a defined protected service area, which is not part of present SMR rules. If adopted, these provisions will be strictly enforced.

In summary, this proceeding, addressing the structure of 800 MHz Specialized Mobile Radio (SMR) systems, is reflective of the transition that telecommunications is undergoing. The tremendous technological changes that continue to occur, the substantial private investment being committed, and the opportunities created in terms of employment and wider choice for consumers, are forces that thrive in a competitive market. The Commission seeks to move the environment from one where the government determines the parameters of the competition to where a fair market does. It is in this sense that the Commission is committed to setting the proper balance between the important interests of small businesses operating

local SMR systems and those offering wider services. A flexible plan that encourages a range of diverse services, as well as one that creates an impetus for the parties to resolve issues themselves, will provide a greater capability for the widest variety of providers to make the most efficient use of the spectrum.

I thank you again for your interest in this matter and hope that these responses will assist in your review of the issues in this proceeding.

Sincerely yours,



Reed E. Hundt
Chairman

CERTIFICATE OF SERVICE

I, Lisa Y. Taylor, a secretary in the law firm of Besozzi, Gavin & Craven, hereby certifies that on this 1st day of May, 1995, I did serve, by first class U.S. mail, postage prepaid, a copy of the foregoing "**SUPPLEMENTAL CONSOLIDATED REPLY COMMENTS OF DRU JENKINSON, INC., JANA GREEN, INC., AND SHELLY CURTRIGHT, INC.**" to the following individual:

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, NW
Room 814
Washington, DC 20554

James H. Quello
Commissioner
Federal Communications Commission
1919 M Street, NW
Room 802
Washington, DC 20554

Andrew C. Barrett
Commissioner
Federal Communications Commission
1919 M Street, NW
Room 826
Washington, DC 20554

Susan Ness
Commissioner
Federal Communications Commission
1919 M Street, NW
Room 832
Washington, DC 20554

Rachelle B. Chong
Commissioner
Federal Communications Commission
1919 M Street, NW
Room 844
Washington, DC 20554

Regina Keeney
Chief
Wireless Telecommunications Bureau
2025 M Street, NW
Room 5002
Washington, DC 20554

Rosalind K. Allen
Acting Chief
Commercial Radio Division
Wireless Telecommunications Bureau
2025 M Street, NW
Room 5202
Washington, DC 20554

David Furth
Deputy Chief, Legal
Commercial Radio Division
Wireless Telecommunications Bureau
2025 M Street, NW
Room 5202
Washington, DC 20554

Terry L. Fishel
Chief, Land Mobile Branch
Licensing Division
Wireless Telecommunications Bureau
1270 Fairfield Road
Gettysburg, Pennsylvania 17325

Michael Regiec
Land Mobile Branch
Licensing Division
Wireless Telecommunications Bureau
1270 Fairfield Road
Gettysburg, Pennsylvania 17325

Honorable Robert Packwood
U.S. Senate
259 SROB
Washington, DC 20510-3702

Honorable Conrad Burns
U.S. Senate
183 SDOB
Washington, DC 20510-2603

Honorable Trent Lott
U.S. Senate
487 SROB
Washington, DC 20510-2403

Honorable John McCain
U.S. Senate
241 SROB
Washington, DC 20510-0303

Honorable Ted Stevens
U.S. Senate 522 SHOB
Washington, DC 20510-0201

Ms. Jill M. Lyon
American Mobile Telecommunications
Association
1150 18th Street, NW
Suite 250
Washington, DC 20036

Mr. Frederick J. Day
Industrial Telecommunications Association, Inc.
1110 N. Glebe Road
Suite 500
Arlington, VA 22201-5720

Mr. Mark J. Golden
Telocator, The Personal Communications
Industry Association
1019 19th Street, NW
Suite 1100
Washington, DC 20036

Lisa Y. Taylor